No. 82-1046

In The

Supreme Court of the United States

October Term, 1982

KANE GAS LIGHT AND HEATING COMPANY,
Petitioner,

vs.

INTERNATIONAL BROTHERHOOD OF FIREMEN AND OILERS, LOCAL 112,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION FOR RESPONDENT

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QUESTIONS PRESENTED

Whether the court of appeals, in upholding a decision by the United States District Court for the Western District of Pennsylvania, which in turn enforced a labor arbitration award, properly concluded that the award drew its essence from the collective bargaining agreement and did not violate public policy.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 687 F. 2d 673 (1982). The opinion and order of the United States District Court for the Western District of Pennsylvania (*id.* at 22a-35a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on August 12, 1982. A petition for rehearing en banc was denied on September 10, 1982 (*id.* at 50a-51a). The petition for writ of certiorari was filed on December 9, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES AND REGULATIONS INVOLVED

The relevant provisions of §301(a) of the Labor-Management Relations Act of 1947, 29 U.S.C. §185(a) is set forth at page 2 of the Petition.

STATEMENT

1. On February 9, 1979, employee R. Alan Pritchard, was assigned to work in the Mt. Jewett, Pennsylvania area for Kane Gas Light and Heating Company, a public utility whose offices are located in Kane, Pennsylvania (Pet. App. 54a-55a).

Pritchard had been ordered by his supervisor to increase gas pressure in the Kane, Pennsylvania area. After accomplishing this, he was later that morning instructed to reduce pressure in Kane by turning off a bypass valve (*id.* at 54a-55a). Pritchard thereupon returned to the regulator station in Mt. Jewett where the bypass valve was located and not only closed that valve but the main valve itself. As a result of the closure of the main valve, the gas line pressure in Kane dropped precipitously (*id.* at 54a-55a). A Company representative was sent to the regulator station and the main valve was turned back on.

Pritchard was questioned by the Company concerning the incident (*id.* at 54a-55a). He advised the Company that his actions had been a mistake and he was thereupon directed to return to

his home. Subsequently, an investigation was conducted and on February 13, 1979, Pritchard was advised by letter that his employment had been terminated (*id.* at 56a).

2. Under the terms of the collective bargaining agreement between Pritchard's Union, Local 112, International Brotherhood of Firemen and Oilers, AFL-CIO, and the Company, a grievance was filed. Because the collective bargaining agreement between the parties did not provide for binding arbitration as to those disputes arising thereunder, the parties by mutual consent agreed to submit the grievance concerning the discharge of Pritchard to binding arbitration (*id.* at 25a). Arbitrator Charles L. Mullin was selected through the auspices of the American Arbitration Association to serve as arbitrator to hear the dispute (*id.* at 25a).

A series of hearings were conducted in Kane, Pennsylvania on October 19 and November 16, 1979 (*id.* at 52a). Subsequent thereto, the parties submitted post-hearing briefs (*id.* at 53a) and on March 10, 1980, the arbitrator rendered his award, supported by an opinion. In his award, he held:

> The grievance is sustained to the extent that the Grievant is to be reinstated with effect from thirty days following the date of discharge. The period running from the date of discharge to the date of reinstatement shall be treated as a Disciplinary Suspension.
>
> Back pay is granted to the extent of the difference between earnings and Unemployment Compensation, and that amount which the Grievant would have received as earnings had he worked subsequent to his reinstatement as effected herein.

> The undersigned retains jurisdiction for the resolution of any differences arising out of the implementation of this Award.
>
> s/Charles L. Mullin, Jr.
>
> March 10, 1980
> Pittsburgh, Pennsylvania

(*Id.* at 62a-63a.)

3. The petitioner sought review of the arbitrator's decision in the United States District Court for the Western District of Pennsylvania (*id.* at 22a). After a motion for summary judgment was filed by the Union (*id.* at 22a) the district court, on December 18, 1980 rendered a decision granting the Union's motion for summary judgment (*id.* at 34a).

The district court rejected all of the grounds advanced by Kane Gas in support of its contention that the arbitration award issued should have been vacated. First, the district court concluded that the arbitrator did indeed make a finding that the Company had failed to sustain its burden of showing proper cause (*id.* at 28a). In addition, the district court also held that the arbitrator was free to decide issues of credibility concerning the testimony of Pritchard (*id.* at 28a-29a). Moreover, the district court upheld the right of the arbitrator to exercise his discretion and, as part of his remedy, ordered that the discharge be reduced to a thirty day suspension (*id.* at 29a, 62a).

In the district court's view, those federal statutes and United States Department of Transportation regulations governing transmission of natural gas in interstate commerce did not represent a basis for vacating the arbitration award reinstating Pritchard (*id.* at 29a-30a). The district court held that, regardless

of the dangers inherent in the situation that ultimately led to Pritchard's discharge, the question of whether Pritchard's conduct warranted discharge was something for the arbitrator (*id.* at 30a).

The district court went on to conclude that its scope of review was severely circumscribed by the decisions of the United States Supreme Court in *United Steelworkers v. Enterprise Corporation*, 363 U.S. 593 (1960) and *United Steelworkers v. American Manufacturing Company*, 363 U.S. 554 (1960) and the court of appeals in *Ludwig Honold Mfg. Co. v. Fletcher*, 405 F. 2d 1123 (3d Cir. 1969) (*id.* at 31a-32a).

The district court thus entered judgment for the Union and against the Company and ordered the arbitration award reinstating Pritchard to his position enforced (*id.* at 34a). The court reserved for determination at a later date the question of an award of attorney's fees to the Union (*id.* at 35a).

4. An appeal was filed by Kane Gas from the decision of the district court. The court of appeals remanded the matter to the district court for want of an appealable order, given the fact that the district court had not made a decision with regard to the Union's petition for attorney's fees.[1] After remand, the district

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1. This decision by the court of appeals was reported at 672 F. 2d 903 (3d Cir. 1981). The court of appeals relied on its rule then prevailing, as enunciated in *Croker v. Boeing and Company*, 662 F. 2d 975 (3d Cir. 1981). Subsequent to the court of appeals decision in *Croker*, the Supreme Court decided in *White v. New Hampshire Department of Employment Security*, ___ U.S. ___, 102 S. Ct. 1162, 71 L. Ed. 2d 325 (1982) that a motion for attorney's fees raises legal issues which are only collateral to the merits of the main cause of action and accordingly such a motion need not be made within the ten day period permitted by Fed. R. Civ. P. 59(e) for motions to alter or amend judgments.

court entered an order on December 23, 1981 which rejected the Union's petition for attorney's fees (*id.* at 6a-7a).

Again, the Company appealed from the order of the district court while the Union filed a cross-appeal in order to challenge the decision of the district court denying its petition for attorney's fees (*id.* at 7a).

5. The court of appeals affirmed the decision of the district court which required enforcement of the arbitration award reinstating Pritchard (*id.* at 2a). In reaching its decision, the court of appeals rejected the Company's assertion that the arbitrator had somehow disregarded the terms of the collective bargaining agreement, thus rendering a decision that was arbitrary and capricious (*id.* at 7a). Relying on its own decision in *Ludwig Honold Mfg. Co. v. Fletcher,* 405 F. 2d 1123 (3d Cir. 1969) for the proposition that the scope of review of a labor arbitration award is extremely narrow, the court of appeals concluded that, regardless of its own sentiments which questioned the wisdom of the arbitrator's decision, nonetheless the arbitrator's decision drew its essence from the collective bargaining agreement and required enforcement (*id.* 7a-10a).

Accordingly, the court of appeals concluded (*id.* at 14a):

> Reduced to its essence, then, the Company's argument consists of complaints that the arbitrator incorrectly interpreted the agreement in light of the evidence and that his findings were erroneous. Based on our review of the transcripts and the documentary evidence, we are inclined to agree, the arbitrator's decision was indeed a dubious one. Nevertheless, we are satisfied that the arbitrator stayed well within the confines of the collective bargaining agreement and the submitted grievance.

> Thus, while we would not have made the findings by the arbitrator, and would not have evaluated the evidence as he did, we see no basis under the standard established in *Ludwig v. Honold* [sic] for disturbing the arbitrator's award.

Also raised with the court of appeals was the Company's contention that the arbitration award somehow violated public policy. The court of appeals rejected this alternative attack upon the arbitration award, noting that the challenge appeared to be derived from a footnote in its opinion in *Ludwig Honold, supra,* specifically the suggestion that a court decline to enforce an arbitrator's award on the ground of "inconsistency with public policy". 405 F. 2d at 1128, n. 27 (*id.* at 14a). The court of appeals went on to hold that the public policy basis for vacating arbitrator's award applies only where the award itself would conflict directly with either federal or state law (*id.* at 15a). According to the court of appeals, where enforcement of an arbitration award would in essence sanction violations of specific federal or state law then a basis might exist for vacating the award (*id.* at 16a).

The court of appeals held that enforcement of the arbitrator's award which clearly provided for a penalty, *i.e.*, a thirty day suspension, would hardly amount to "judicial condonation" of illegal acts (*id.* at 17a). Moreover, the court of appeals concluded that there was no federal or state law that would compel discharge under the circumstances and therefore the award could not be vacated on the ground that it was inconsistent with public policy (*id.* at 17a). The court of appeals then rejected the appeal of the Union from the decision of the district court denying the Union's petition for attorney's fees (*id.* at 18a-19a).

REASONS FOR DENYING THE WRIT

1. The decision of the courts below that the arbitration award of Charles L. Mullin, Jr. drew its essence from the collective bargaining agreement and a Company attack upon the award based on the grounds that the arbitrator somehow erred in his conclusion cannot be used as a basis for overturning such an award — follows the principle adopted by that court in *Ludwig Honold Manufacturing Co. v. Fletcher*, 405 F. 2d 1123 (3d Cir.). That principle has also been accepted by virtually every other court of appeals that has addressed this issue. *See Amoco Oil Company v. Oil Chemical and Atomic Workers International Union, Local 7-11*, 548 F. 2d 1288 (7th Cir.) *cert. denied*, 431 U.S. 905 (1977); *Campo Machinery Co., Inc. v. Local Lodge No. 1926, International Association of Machinists*, 536 F. 2d 330 (10th Cir. 1976); *General Drivers v. Sears Roebuck and Company*, 535 F. 2d 1072 (8th Cir. 1976); *Aloha Motors v. ILWU Local 142*, 530 F. 2d 848 (9th Cir. 1976); *Crigger v. Allied Chemical Corp.*, 500 F. 2d 1218 (4th Cir. 1974); *International Union of Electrical, Radio and Machine Workers v. Peerless Pressed Corp.*, 489 F. 2d 768 (1st Cir. 1973); *Safeway Stores v. American Bakery and Confectionary Workers International Union Local 111*, 390 F. 2d 79 (5th Cir. 1968). Those decisions are all derived from the decisions of the Supreme Court in the *Steelworker Trilogy: United Steelworkers of America v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers of America v. Warrior and Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960). Accordingly, review by this Court is not warranted, given that the underlying nature of the petitioner's challenge lies in the petitioner's belief that the arbitrator erred.

2. Contrary to petitioner's contention (Pet. 7-15), the arbitration award reinstating Pritchard to his position violated no public policy. The petitioner can point to no federal or state

statute which mandated that Pritchard be terminated from his position. The arbitrator's award does not reinstate an individual to a position which, by law, the individual can no longer fill.

Had Pritchard, as a result of the events of February 9, 1979, lost a license, the possession of which by virtue of federal or state law, was necessary to perform his job then the Company might be in a position to assert that an award reinstating Pritchard to that position to which the license is necessary would violate public policy. However, at no point in the proceedings has the petitioner ever demonstrated that federal law or regulation or state law mandates Pritchard's discharge or establishes certain conditions that Pritchard, by virtue of the actions of February, 1979, can no longer meet. The Company's failure to make any demonstration whatsoever in this regard completely undercuts its contention that the arbitration award in question should not be sustained. The court of appeals therefore correctly concluded that the award, no matter how much the court itself disagreed with the findings and decisions of the arbitrator as contained therein, warranted enforcement.

Absent that demonstration that federal or state law either mandated Pritchard's discharge or that his reinstatement offends an express statute, the court of appeals really had no alternative but to uphold the award. Once the Company failed to make the demonstration just described, then its public policy argument is reduced merely to a suggestion that, in light of the legal obligation that the Company transport and handle natural gas in a safe manner, that it would not be wise to continue Pritchard's employment. This is clearly an argument that is appropriate for an arbitrator; a party asking a court, upon review, to consider such an argument is, in essence, asking that forum to place itself in the role of the arbitrator, a position foreclosed by the *Steelworker Trilogy*.

3. The question of the burden of proof, raised by the petitioner (Pet. 14-15), was implicitly considered by the court of appeals. Indeed, the court of appeals directly noted, ". . .the arbitrator expressly rejected the Company's contentions that Pritchard 'was insubordinate and deliberately restricting the flow of gas' or that Pritchard intentionally sabotaged the Company by such an act." (Pet. App. at 13a). The court of appeals had earlier concluded in a footnote that there was evidence in the record to support this contention (*id.* at 11a, fn. 8). Thus, the court of appeals merely concluded that the arbitrator had found evidence on which to base his opinion and correctly concluded that it would not, in light of the narrow scope of review, disturb the arbitrator's findings. In essence, the court of appeals found that the arbitrator had a basis for deciding that the Company had failed to meet its burden of proof.

The Company's attempt to suggest that the arbitrator employed a different standard of proof than that to which the parties stipulated at the arbitration hearing (Pet. 14) when he wrote that there was no conclusive evidence of improper motivation on Pritchard's part (Pet. App. at 25a) misconstrues the arbitrator's opinion. All that the arbitrator decided was that based on the evidence before him, he was not satisfied that the Grievant had acted intentionally and that accordingly there was insufficient evidence to justify a discharge. In other words, the arbitrator decided that the Company had failed to offer evidence sufficient to permit him to reach the conclusion that Pritchard acted with improper motivation. The arbitrator neither implicitly nor explicitly decided that the burden of proof was anything other than that which the parties stipulated to; any attempt to suggest otherwise is the result of semantical confusion. The arbitrator's conclusions concerning improper motivation hardly changes the burden of proof, thereby making the Company's argument merely a challenge to the arbitrator's findings, a challenge which the court of appeals correctly rejected (*id.* at 14a).

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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